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No. 99-1143

IN THE
Supreme Court of the United States

ABRAHAM D. SOFAER,
Petitioner,
v.

DISTRICT OF COLUMBIA COURT OF APPEALS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the District of Columbia Court of Appeals

REPLY BRIEF FOR PETITIONER

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TABLE OF AUTHORITIES

Cases Page

Bankers Life and Casualty Co. v. Crenshaw, 486 U.S. 71 (1988) 4
City of Chicago v. Morales, 119 S. Ct. 1849 (1999) 5
Committee for Washington's Riverfront Parks v. Thompson, 451 A.2d 1177 (D.C. App. 1982) 2
Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991) 3
Kolender v. Lawson, 461 U.S. 352 (1983) 3, 5
Lankford v. Idaho, 500 U.S. 110 (1991) 7, 8
Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) 5
Partington v. Gedan, 961 F.2d 852 (9th Cir. 1992) 4
Russell v. United States, 369 U.S. 749 (1962) 7
United States v. Lanier, 520 U.S. 259 (1997) 3

Other Materials

American Bar Association, Model Rules of Professional Conduct (1995) 4
District of Columbia Rules of Professional Conduct, Rule 1.11(a) ..... *passim*
E. Cleary, *et al.*, *McCormick on Evidence* (3d ed. 1984) 4

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The Brief in Opposition fails to come to grips with either of the due process issues presented in our Petition. Those issues merit review by this Court.

1. The "revolving-door" rule of the District of Columbia Rules of Professional Conduct (Rule 1.11(a)), as construed, sets a broad, prophylactic standard that permits imposition of sanctions for conduct raising no more than an appearance of impropriety: *i.e.*, punishment may be imposed where there is a possibility that, during his government service, a lawyer "may have received" confidential information relevant to a later private representation. The Petition seeks review of the question whether this sort of appearance-based standard is too vague and elastic —too unpredictable for a lawyer to apply with assurance and too subject to arbitrary enforcement—to meet the minimum due process requirements for criminal and quasi-

criminal laws. Pet. 15-25. Rather than confront this issue, respondents elect to sidestep it, arguing that the case is "fact-intensive and fact-specific," Br. in Opp. 6, 13, and dismissing it as "a matter of purely local concern to lawyers practicing in the District of Columbia and admitted to the District of Columbia Bar." Br in Opp. 6. These assertions are neither accurate nor adequate.

To begin with, the question whether the "revolving-door" rule comports with due process principles is anything but "fact-intensive and fact-specific." The central issue is purely a legal one: may an attorney be sanctioned on the ground that he failed to recognize that he might have received information that, in fact, he did not receive? *See* Pet. App. 5a (violation of Rule 1.11(a) established by inference that an attorney "may have received information during [his government service] that might be useful [in a subsequent private representation]") (internal quotes omitted). If we are correct that this hypothetical standard not only gives insufficient notice of prohibited conduct but also grants unduly wide discretion to enforcement officials, then the sanction here cannot stand. That is a matter of law, not of fact.

Respondents are also off the mark in saying that petitioner "was not sanctioned based on an appearance of impropriety." Br. in Opp. 9. The District of Columbia Court of Appeals has explicitly said that the "revolving-door" rule is "intended to prohibit conduct which would present even the appearance of impropriety." *Committee for Washington's Riverfront Parks v. Thompson*, 451 A.2d 1177, 1188 (D.C. App. 1982). Furthermore, the "may have received" standard, on its face, makes a violation turn on whether hypothetical persons could possibly believe that relevant confidential information was received during government service, even if no such information actually was received (and therefore could not have been

used in a later representation). The emphasis on what observers might tend to believe, rather than on what actually happened, makes clear that Rule 1.11(a) is, as it was meant to be, an appearance-based rule, and it is on that basis, and that basis alone, that petitioner was sanctioned. *See* Pet. App. 5a ("the 'actual receipt of . . . information' . . . is immaterial") (quoting *Brown v. District of Columbia Bd. of Zoning Adjustment*, 486 A.2d 37, 50 (D.C. App. 1984) (*en banc*)).

This focus on appearance presents a compelling issue of unconstitutional vagueness. By virtue of that standard, a lawyer seeking to comply with an appearance-based "revolving-door" rule is unable to determine its applicability by relying upon his own knowledge of the information that he received during his government service. Rather, the lawyer is put to the murky task of imagining what a hypothetical person—having only a rudimentary awareness of the lawyer's government work—might think that he received. If the lawyer believes that he passes even this opaque test, enforcement officials are then free to engage in their own conjectural exercise, deciding (as here) that *their* hypothetical person would take a different view, inferring that the lawyer could have received relevant information that, in truth, he did not receive. While this process of guesswork may be acceptable in matters of disqualification, *see* Pet. 23-24, it is too malleable and imprecise to support the imposition of disciplinary sanctions. *See Gentile v. State Bar of Nevada*, 501 US. 1030 (1991); *see also Kolender v. Lawson*, 461 U.S. 352 (1983); *United States v. Lanier*, 520 U.S. 259, 265 (1997).[1]

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[1] Although respondents say that this due process "argument" is "different" from the due process argument made below, Br. in Opp. 8, they do not question that the issue is properly presented. As noted in the Petition, petitioner has pressed his due process objections, both to the standards of Rule 1.11(a) and to the procedure followed, at each stage of the proceedings below. *See* Pet. 10-11. That being so, " 'parties are not confined here to the same argu-

Respondents do not actually dispute that the rule is vague, raising instead a defense of necessity: *i.e.*, that an inquiry into actual receipt of information "would impair attorney-client relations." Br. in Opp. 10. But, while the confidentiality of "attorney-client relations" is obviously an important concern, it is an odd theory that would allow a government, in order to avoid discomfiting problems of proof, simply to punish persons for what they might have done, without having to show that they actually did it. It is hardly surprising, therefore, that, in similar contexts, the organized Bar and the courts have concluded that concerns about confidentiality do not trump the right of a lawyer to defend himself against ethical charges. To the contrary, the model disciplinary rules expressly recognize that, notwithstanding important interests in preserving confidentiality, a lawyer is entitled to breach the attorney-client privilege in order to rebut charges of misconduct. *See* American Bar Association, Model Rule of Professional Conduct 1.6; E. Cleary, *et al.*, *McCormick on Evidence* § 92, at 221 (3d ed. 1984). *See also Partington v. Gedan*, 961 F.2d 852, 863 (9th Cir. 1992). The Bar should not be able to undermine the right to a full defense simply by watering down the standard to permit findings of misconduct to be based on "what might have been." [2]

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ments which were advanced in the courts below upon a federal question there discussed.'" *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 78-79 n.2 (1988) (quoting *Dewey v. Des Moines*, 173 U.S. 193, 198 (1899)). *See also* Pet. 17 n.12.

[2] The conflict between confidentiality and a fair defense is largely illusory in this case, of course, given that the State Department has never claimed that petitioner received any confidential information that he might have been able to use in his limited representation of Libya. The charges were brought and prosecuted by Bar Counsel on the basis of newspaper stories, not because of a complaint by the State Department or anyone else.

Although respondents fault petitioner for not seeking "ethics advice" from the Bar, Br. in Opp. 10, this complaint (apart from disregarding the many cautionary steps taken by petitioner and his law firm) actually serves to highlight the problems associated with a vague law. To satisfy due process, a law used for punishment, not mere regulation, should be written with sufficient clarity to tell citizens "what conduct is prohibited," *Kolender*, 461 U.S. at 357, *without* the need to consult with enforcement officials in advance. Moreover, in the immediate context here, it is a troubling notion that, for lawyers to undertake certain private representations, it is necessary for them first to seek and obtain permission from the Bar. That prospect would be bad enough under a law with clear, precise terms, but the loose nature of the hypothetical-person standard raises the unsettling possibility that permission will be granted more easily to favored lawyers (or those with uncontroversial clients) and more readily withheld from disfavored lawyers (or those with unpopular clients). That risk would be just as prominent in a system calling for preclearance as it is in the present system, imposing disciplinary sanctions after the fact. *See* Pet. 20-22.

All this is not—as respondents would have it—"a matter of purely local concern." Br. in Opp. 6. While the District of Columbia ethical rules naturally apply only to members of the District of Columbia Bar, the scope of the law does not distinguish this case from other cases reviewed and decided by this Court. The ordinance struck down in *City of Chicago v. Morales*, 119 S. Ct. 1849 (1999), applied only to people in Chicago, and the ordinance invalidated in *Papachristou v. City of Jacksonville*, 405 U.S. 156 (1972), applied only to people in Jacksonville, yet the Court recognized that the constitutional issues raised by those laws were of wide-ranging significance. Indeed, the law at issue in this case is far less "local" than those city ordinances, given the fact that

the District of Columbia "revolving-door" rule is part of the Model Rules of Professional Conduct, which have been adopted, to a greater or lesser degree, in more than 40 States. And, even if that were not so, there is particular reason to assure that the rule, as construed and applied in the District of Columbia, comports with constitutional standards, in light of the large numbers of District of Columbia Bar members that serve in the federal and local governments. The question thus is serious and important, and it warrants the attention of this Court.

2. With respect to the second question presented, respondents do not deny that a post-hearing change in the charges against petitioner took place. Although they twice claim that the charges against petitioner were "identical," Br. in Opp. 11, 13, they ultimately concede that the Hearing Committee acted "on a basis *not identical* to that proposed by Bar Counsel." Br. in Opp. 12 (emphasis added). The question thus becomes: is that alteration of charges—replacing three alleged particular "matters" with one broader, all-encompassing "matter"—consistent with due process? Respondents seem to offer two possibilities for why it might be. The first is that petitioner was always accused of violating the same rule. *See* Br. in Opp. 11 ("[a]t all times, Petitioner faced a charged violation of Rule 1.11(a)—nothing more or less"). The second is that, even if the details changed, the broad parameters of the charges stayed the same. *See* Br. in Opp. 13 ("[p]etitioner was fairly on notice that his conduct in government and subsequent private practice formed the basis of the allegation that he had violated Rule 1.11(a)"). Neither of these arguments remotely resolves the due process problem.

Although respondents are correct that petitioner was always charged with a violation of Rule 1.11(a), they cite no authority for the proposition—irrational on its face

—that prosecuting officials are free to charge one thing and prove another, so long as the cited statute or rule remains the same. Not unexpectedly, the law is to the contrary: it is the *particulars* of a charge, not just the governing statute or rule, that must be set forth with specificity. *See, e.g., Russell v. United States,* 369 U.S. 749, 764-65 (1962). Similarly, to satisfy that requirement, it is not enough simply to set out the general outline of a charge, without more; as this Court has stated, "[n]otice of *issues to be resolved* by the adversary process is a fundamental characteristic of fair procedure." *Lankford v. Idaho,* 500 U.S. 110, 126 (1991) (emphasis added). While petitioner did know that the charge against him involved "his conduct in government and subsequent private practice," he was entitled, in addition, to know the basis upon which that conduct was under scrutiny, without having the basis changed after the evidence refuted the original allegations.

It is thus not "immaterial" that the Hearing Committee acted "on a basis not identical to that proposed by Bar Counsel" (Br. in Opp. 12). The critical question in the case was whether petitioner, while at the State Department, had participated personally and substantially in a "matter" that was substantially related to the matter that he agreed to undertake for Libya. This comparison of government and private matters made it essential for petitioner to be told just what government "matters" were at issue, especially given the fact that the Rule 1.11(a) test turns, not on whether petitioner actually *received* relevant confidential information during his work (something that petitioner could know simply from the fact that he received it), but rather on whether he *might have received* such information (something that petitioner could only speculate about, based on the definition of the particular matters). Having directed his defense to the three matters set forth in the specification of charges—

one of which (the Criminal Case) had been specifically disavowed by Bar Counsel at the hearing (R. 23, p. 298) —petitioner was then sandbagged by the recasting of the charges by the Hearing Committee, after his opportunity to contest them had closed. *See* Pet. 26-28.

Respondents claim that petitioner has shown no "discernible prejudice" from this revision of charges, Br. in Opp. 13, but the opposite is true. *See* Pet. 28. To take just one example, after Bar Counsel had expressly conceded that petitioner had not participated personally and substantially in the Criminal Case, petitioner was fully entitled to think that he had no further need to defend against the claim that he might have received material information in that case. *See Lankford v. Idaho*, 500 U.S. at 119-27.[3] Had petitioner been aware that his involvement in the Criminal Case was nevertheless still in question—as it turned out to be under the redrawn definition of the "matter" subsequently announced by the Hearing Committee—he could have, and would have, introduced evidence that, for instance, the Justice Department excluded the State Department from any involvement in the criminal investigation, and that the ominous-sounding "daily briefings" never contained any information of the sort that could possibly be regarded as useful to the later representation of Libya. That evidence would have showed that, to the extent that the briefings even

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[3] In *Lankford*, the Court found a lack of fair notice when a trial judge imposed a death sentence after the prosecution had stated that it was not seeking such a sentence. 500 U.S. at 119-27. The Court noted that this representation by the State—even though not binding on the judge—"had the practical effect of concealing from the parties the principal issue to be decided at the hearing," 500 U.S. at 126, and that, as a result, the defendant had not presented evidence going to that issue. 500 U.S. at 122-26. For that reason, the Court observed, fair notice of the critical issues is essential to the proper working of the adversary process. 500 U.S. at 127.

mentioned the investigation into the Pan American bombing (which was almost never), they set forth information of a general nature and were *not* briefings based upon the criminal investigation itself.[4] The inability to offer that proof—and thereby shut off the spiral of subsequently asserted, free-floating surmises about what the briefings might have contained—created prejudice of a very real kind.

Bar disciplinary proceedings are not meant to be a game of bait-and-switch. Here, the belated rewriting of charges denied petitioner basic due process. This Court should grant review to address and clarify the duty of professional disciplinary bodies to adhere to the charges made and tried.

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[4] Apparently not content with the rewriting of the charges by the Hearing Committee, respondents seek to rewrite them again, claiming that "there is no basis to dispute that Petitioner was personally and substantially involved in both the bombing investigation and the resulting civil litigation as a government attorney." Br. in Opp. 9. In fact, petitioner participated personally and substantially in neither. As we explain in the text, his role in the "bombing investigation" consisted of nothing other than receiving a handful of utterly uninformative reports over the course of several years. As for the "resulting civil litigation," petitioner did little more than help with the response to a single subpoena (which was ultimately quashed), an action that the Hearing Committee found *not* to amount to personal and substantial participation in that case. Pet. App. 125a. Respondents' assertions to the contrary demonstrate quite clearly the difficulties faced by a defendant confronted with ever-changing accusations of possible misconduct.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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